Nos. 87-2084 and 88-214

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NORMAN JETT,
Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MICHAEL H. GOTTESMAN
JEREMIAH A. COLLINS *
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Constitution, Statutes and Regulations

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-2084 and 88-214

NORMAN JETT,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed by the National Education Association (NEA) with the consent of the parties pursuant to Rule 36.2 of the Court.

STATEMENT OF INTEREST

NEA is a nationwide employee organization with a current membership of some 1.9 million members, the vast majority of whom are employed by public educational institutions. NEA operates through a network of affiliated organizations: it has as state affiliates organizations in each of the 50 States, the District of Colum-

bia and Puerto Rico, and it has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. One of the principal purposes of NEA and its affiliates is to protect the constitutional and statutory rights of teachers, professors and other educational employees, including the right to be free from racial discrimination in employment. Because the Court is being asked to decide issues of vital importance to the effective vindication of these rights, NEA has a substantial interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

At bottom, the question in this case—a question that arises in numerous contexts at common law and under many statutes and constitutional provisions—may be put as follows: given that an employer or other entity can act only through human agents, when is it proper, in a case that turns on motive, to hold an employer liable on the basis of the impermissible motive of one of its agents? The question arises here under the Equal Protection Clause of the Fourteenth Amendment (as enforced through 42 U.S.C. § 1983), and under 42 U.S.C. § 1981, in the context of the removal of a public employee from his position with the school district for what were found to have been racially discriminatory reasons.[1]

The thrust of our submission is that in the final analysis, the answer to this question is to be found in the *substantive* provisions that plaintiff seeks to enforce—here, § 1981 and the Equal Protection Clause—rather than in the *procedural* provision, § 1983, that provides the enforcement mechanism for one of plaintiff's claims. Thus, as we will show, the Court of Appeals proceeded

---

[1] The jury also found that plaintiff's removal was based in part on his exercise of First Amendment rights. As it is not clear whether the questions on which certiorari was sought and granted include the First Amendment issue, we do not address it.

on the wrong track in taking the view that the concept of "policymaking" developed in the line of § 1983 cases beginning with *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and extending through *City of St. Louis v. Praprotnik*, —— U.S. ——, 108 S. Ct. 915 (1988), provides the answer to the question presented here.

Our argument proceeds as follows:

1. The predicate for the Court's adoption in *Monell* of the "official policy" doctrine was the Court's conclusion that a governmental entity should not be held liable under § 1983 by application of the doctrine of *respondeat superior*, which would "impos[e] liability on an employer for the torts of an employee when the sole nexus between the employer and the tort is the fact of the employer-employee relationship." *Monell*, 436 U.S. at 693. Finding that such an imposition of liability would be inconsistent with the language and history of § 1983, the Court fashioned the "official policy" requirement "to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986) (emphasis by the Court). Thus, under *Monell*, "recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered." *Id.* *See infra* at 7-9.

2. In many § 1983 cases, where the injury to the plaintiff consists simply of the acts of certain individuals which do not inherently involve official action of the governmental entity, and which would inflict precisely the same harm whether or not they were adopted or effectuated in any way by the entity, the concept of final policymaking authority as developed in *Pembaur* and *Praprotnik* may provide a necessary and appropriate analysis

for determining whether the injury may fairly be said to be due to an act "of the municipality." This is true, for example, when the plaintiff's complaint concerns a shooting or other such misconduct by a law enforcement officer, as in *Pembaur, supra, Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), and *City of Springfield v. Kibbe*, 480 U.S. 257 (1987). *Cf. City of Canton v. Harris*, No. 86-1088 (pending). *See* infra at 9-10.

But there is another category of cases, exemplified by the case at bar, in which the actions of the individual wrongdoers gain their power to injure the plaintiff *only because the government, through its official decision-making processes, elects to translate those actions into official action of the government.* In this case, for example, the statements, recommendations and decisions of the various School District agents worked a constitutional injury on plaintiff Jett *only because those actions were treated by the Dallas Independent School District as operating to terminate Jett's status with the District* as coach and athletic director. Thus, this is not a case where "the sole nexus between the employer and the tort is the fact of the employer-employee relationship," *see supra* at 3; rather, it is a case where the injury *necessarily* is an act of the governmental entity. In the language of *Pembaur*, the School District, by treating Jett as no longer its coach and athletic director, has "officially sanctioned" his removal, and "is actually responsible" for it. *See infra* at 10-11.

This point is confirmed by the fact that the injury of which Jett complains could only be remedied by an order restoring him to his position—an order that could be entered *only against the School District.* The fact that only the District can remedy the wrong is a sure indication that the wrong is an act of the District. *See infra* at 11-12.

The argument we advance was not addressed in *Monell, Praprotnik*, or any of the other cases in which this Court has elaborated on the "official policy" concept.

And, several decisions of the Court support our view that in circumstances such as those presented here, an act of an agent necessarily constitutes an act of the governmental entity even if the agent does not possess final policymaking authority. *See infra* at 12-15.

For these reasons, the limitations on governmental liability set out in § 1983, as construed in *Monell*, necessarily are satisfied in a case of this sort, because the injury involved is inherently an action of the government; and there accordingly is no need to determine whether the particular individuals involved in the government's decisionmaking process were "policymakers."

3. But this does not exhaust the inquiry. For § 1983 is a *procedural* statute, which does not provide any rights on its own; and the question whether the plaintiff has proved the elements of an actionable claim, including any applicable requirement of state-of-mind, is to be answered in the final analysis not by reference to § 1983, but by examining the *substantive* statutory or constitutional provisions on which the suit is based—here, the Equal Protection Clause and § 1981. *See infra* at 15-16. Because both of those provisions turn on proof of a discriminatory purpose, the question becomes one of determining the circumstances in which it would effectuate the purposes of the Equal Protection Clause and § 1981 to impute the motivation of a particular human actor to the governmental entity.

In a case of this sort, where the considerations that *Monell* recognized as arguing against the application of *respondeat superior* are not present, a strong argument can be made that it is appropriate under the Equal Protection Clause and § 1981 to impute to an employer the motivation of *any* agent who has played a "but-for" part in the employer's decision. At least some members of the Court appear to have adopted that view of § 1981 in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

But to resolve this case it is sufficient to travel only a part of the way: *viz.*, to recognize that for the purposes of § 1981 and the Equal Protection Clause, the improper motive of an agent should be attributed to a governmental entity *when the entity's decisionmaking process has been so structured as to rely upon the discretion of that agent.* If a governmental entity creates a situation where the discretionary judgments of a particular individual will control the entity's course of action, the core command of both § 1981 and the Equal Protection Clause that the government not make decisions based on intentional discrimination compels a holding that the governmental entity is liable when it takes action on the basis of the discriminatorily motivated decision of that individual. *See infra* at 17-18.

This approach is consistent with the rules applied in analogous situations, including Title VII. On the other hand, to resolve the question by reference to the *Praprotnik* definition of "official policy," and thus to construe § 1981 and the Equal Protection Clause as leaving the government free to effectuate the discriminatorily motivated decisions of all but its "final policymakers," would be unfounded. *See infra* at 18-23.

4. Applying this approach, the judgment against the School District was proper and should be reinstated. *See infra* at 23.

ARGUMENT

I. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), "insofar as it holds that local governments are wholly immune from suit under § 1983." 436 U.S. at 663. At the same time, the Court "uph[e]ld *Monroe* . . . insofar as it holds that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees." *Id.* at 663-64 n.7.

The Court's rejection of *respondeat superior* as a basis for governmental liability[2] under § 1983 was predicated on two considerations, *id.* at 691-94: (i) the language of § 1983, which extends liability only to defendants who "subject [the plaintiff] or cause [him] to be subjected" to a deprivation of rights, and (ii) the refusal of the 1871 Congress to enact the Sherman Amendment, which would have made local governments responsible for damages inflicted by private parties in a riot.[3] *See also Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-81 (1986). Reasoning from those two points,[4] the Court held that a

---

[2] Although *Monell* and subsequent cases often speak of "municipal" liability, the *Monell* doctrine applies to all governmental bodies that are suable under § 1983, including states (when sued directly in cases where the Eleventh Amendment is inapplicable, or indirectly by naming as defendant a state officer in his official capacity, *see Kentucky v. Graham*, 473 U.S. 159, 166-67 and n.14 (1985)), and school boards, *see Monell*, 436 U.S. at 662-63. For simplicity, we will refer to all such defendants as "governments."

[3] *See id.* at 666-68, 679 (opinion of the Court); *id.* at 706 (Powell, J., concurring).

[4] The Court acknowledged that "the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees," *Monell*, 436 U.S. at 693 n.57; but the Court stated that "the inference that Congress did not intend to impose such liability is quite strong," *id.*

governmental entity cannot be held liable under § 1983 "*solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691 (emphasis by the Court). *See also id.* at 692 (government cannot be held liable "solely on the basis of the existence of an employer-employee relationship with a tortfeasor"); *id.* at 693 (*respondeat superior* would "impos[e] liability on an employer for the torts of an employee when the sole nexus between the employer and the tort is the fact of the employer-employee relationship").

Having rejected the applicability of *respondeat superior*, the Court adopted in its place the following standard:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694.

As the Court has subsequently explained:

> The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from the municipality is limited to acts that are, properly speaking, acts "of the municipality"—that is, acts which the municipality has officially sanctioned or ordered.

Pembaur, supra, 475 U.S. at 479-80 (footnote omitted) (emphasis by the Court).[5] *See also City of St. Louis v. Praprotnik*, —— U.S. ——, 108 S. Ct. 915, 933 n.3 (1988) (opinion of Brennan, J., joined by Marshall and Blackmun, JJ.) (*Monell* "did not employ the policy requirement as an end in itself, but rather as a means of determining which acts by municipal employees are properly attributed to the municipality").[6]

II. The teaching of *Monell* can be properly applied only by recognizing a fundamental distinction between two categories of cases.

A. In one category are cases where the injury to the plaintiff consists simply of the acts of certain individuals which do not necessarily constitute an official act of the

---

[5] The Court noted that this understanding of the "policy" requirement is reflected in the fact that "[the Court's] statement of the conclusion [in *Monell*] juxtaposes the policy requirement with imposing liability on the basis of *respondeat superior*." *Id.* at 1298 n.8.

[6] In subsequent cases where the Court has been called upon to flesh out the contours of the *Monell* "policy" requirement, no opinion has commanded a majority of the Court. *See Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur, supra*; *Praprotnik, supra*. In *Prapratnik*, however, a majority of the Court subscribed to the proposition that only those officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. *Praprotnik*, 108 S. Ct. at 924 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Scalia, JJ.); *id.* at 932 (opinion of Brennan, J., joined by Marshall and Blackmun, JJ.). On the other hand, it is clear that such a policymaker need not actually be making policy in order for the government to be held liable—at least not if the term "policy" is given its common meaning as a rule that is "intended to control decisions in later situations." *See Pembaur*, 475 U.S. at 480 (opinion of Brennan, J., writing for the Court on this point). *See also Praprotnik*, 108 S. Ct. at 932 (opinion of Brennan, J., joined by Marshall and Blackmun, JJ.) (government may be held liable even if the challenged action "[does not] reflect[] generally applicable 'policy' as that term is commonly understood . . . ."); *id.* at 948 (Stevens, J., dissenting).

governmental entity, and which would inflict precisely the same injury whether or not they were adopted or effectuated in any way by the entity. Examples of such cases are complaints about alleged misconduct by law enforcement officers such as shootings, *see Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *City of Springfield v. Kibbe*, 480 U.S. 257 (1987), and improper invasion of private property, *see Pembaur, supra. Cf. City of Canton v. Harris*, No. 86-1088 (pending). In such cases, the wrong does not depend for its existence on any act by the government as such; a private person is fully capable of shooting a gun (*Tuttle*) or chopping down a door (*Pembaur*). The question necessarily posed by such a case is whether the wrong inflicted by the person wielding the gun or the axe should be attributed to the government, solely because of the relationship between that person and the government. In the language of *Pembaur*, a shooting or the chopping down of a door is not inherently an act "of the municipality," 475 U.S. at 478; and in the language of *Monell*, such a case poses the possibility that the government may be held liable "*solely* because it employs a tortfeasor," *i.e.*, "solely on the basis of the existence of an employer-employee relationship with a tortfeasor," "when the sole nexus between the employer and the tort is the fact of the employer-employee relationship." 436 U.S. at 691-93 (emphasis by the Court). The requirement of *Monell* that the plaintiff's injury be linked to a "policy" of the government provides a vehicle for avoiding such a result.

B. But there is a second category of cases, exemplified by the case at bar, in which the actions of the individual wrongdoers inflict an injury upon the plaintiff *only because the government, through its official decisionmaking processes, elects to translate those actions into official action of the government.*

1. For example, in this case the statements, recommendations and decisions of Principal Todd and Superin-

tendent Wright worked a constitutional injury on Jett *only because those actions were treated by the Dallas Independent School District as operating to terminate Jett's status with the District* as coach and athletic director. The injury arose only because the statements, recommendations and decisions of Todd and Wright were adopted as *the action of the School District*, in the very real sense that they were treated by the District as operating to alter Jett's employment relationship *with the District.*[7]

Thus, whether or not the actions of Todd and Wright, standing alone, would be matters for which "the municipality is actually responsible," *Pembaur*, 475 U.S. at 479-80, the *termination of Jett's contract with the School District* is, by definition, such a matter. The School District, by treating Jett as no longer its coach and athletic director, has "officially sanctioned," *id.* at 480, his removal from that position.

2. The fact that the injury complained of in this case is the act of the School District, rather than merely the act of some employee, is further confirmed by a consideration of the remedies that would be required to undo the injury. Damages for a shooting or for breaking down a door or ransacking a room may be recovered by way of an order against the tortfeasor in his individual capacity; but Jett could be restored to his position as coach and athletic director only by an order against *the School District* (or by an order against District officers in their official capacities, which, under *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), would be the same

---

[7] If the School Board, as the ultimate governing body of the School District, had voted to remove Todd, there could be no question but that his removal constituted an official act of the District. In this case, where by operation of the District's official rules the decision of the Superintendent automatically became the final action of the District without the need for a vote of the Board, the situation is analytically indistinguishable.

for *Monell* purposes as an order against the District itself). The fact that only the government can remedy an injury is surely confirmation that the injury is an "act of the municipality."

In sum, in cases of this sort, the actions that are the subject of the complaint are not mere actions of an individual who is proceeding on his own, but necessarily are acts "which the municipality has officially sanctioned or ordered," *Pembaur*, 475 U.S. at 480, and acts "for which the municipality is actually responsible," *id.* at 479-80. It follows that there is no need in such a case to inquire whether the particular individuals who made the recommendations and decisions upon which the municipality acted were "policymakers." *Cf. Praprotnik*, 108 S. Ct. at 932 (opinion of Brennan, J., joined by Marshall and Blackmun, JJ.) (describing another type of § 1983 case in which "the municipal policy inquiry is essentially superfluous").

3. We acknowledge that the foregoing analysis is not consistent with the opinions in *Praprotnik*, a case which involved an employment relationship. *See supra* note 6. However, this line of argument was not addressed by any of the opinions in *Praprotnik*. And, prior decisions of this Court are consistent with our view that in a proper case, an action must be seen as the act of a governmental entity without regard to whether the person formulating the action was a "policymaker."

For example, in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969)—a case cited in *Monell* as an example of governmental liability, *see* 436 U.S. at 663 nn. 5 & 6 (opinion of the Court); *id.* at 711-12 (Powell, J., concurring)—this Court entertained a § 1983 action against a school district based on the actions of the school principals, 393 U.S. at 504, 510, without pausing to consider whether the principals were policymakers. Similarly, in *Hazelwood School District v. Kuhlmeier*, —— *U.S.* ——,

108 S. Ct. 562 (1988), the Court, in determining "when *a school* may refuse to lend its name and resources to the dissemination of student expression," *id.* at 570 (emphasis added), held that the question was to be resolved by reference to the actions of the "educators" involved, *id.* at 571—in that case, the actions of one principal, *id.* at 571-72. Although the case did not directly present a question of individual versus entity liability, the Court plainly viewed the actions of the principal as the actions of "[the] school," without first determining whether the principal was a policymaker.

So too, in *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court viewed the deprivation of property by a state agent as an act of the state, without regard to whether the agent responsible for the deprivation was a policymaker.[8] And,

---

[8] In *Parratt*, the persons allegedly responsible for the loss of the plaintiff's property were the Warden and Hobby Manager of a prison, *see* 451 U.S. at 530, while in *Hudson* the persons responsible were simply correctional officers, *see* 468 U.S. at 519. The Court held that where such agents deprive a person of property, "the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy," *id.* at 533. The Court reached this result, rejecting a proposed requirement of predeprivation process, on the ground that "the state" had not been in a position to provide for predeprivation process, *id.* at 534. Yet the Court made it clear that the initial deprivation itself was "attributable to the State . . . [even though it was] . . . beyond the control of the State," *id.* at 532, quoting *Parratt*, 451 U.S. at 541; and the Court plainly regarded the acts of the correctional officers as constituting one step in "the state's action," *Hudson*, 468 U.S. at 533. *See also Parratt*, 451 U.S. at 540 ("some kind of hearing is required at some time before *a State* finally deprives a person of his property rights") (emphasis added); *Hudson*, 468 U.S. at 539 (O'Connor, J., concurring) ("The Constitution requires *the government*, if it deprives people of their property, to provide due process of law . . . .") (emphasis added). Thus, in both *Parratt* and *Hudson* the Court viewed the act of a state agent in depriving a person of property as an act of the state, even though the agent (at least in *Parratt*) was not a policymaker; and the Court held that the

in *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S 418 (1987), the Court held that tenants of a public housing authority had a cause of action under § 1983 against the Authority for their having been overbilled for utilities in violation of the Brooke Amendment to the Housing Act of 1983, which sets a cap on the rent a public housing authority may charge. The Court did not find it necessary to inquire as to whether a "policymaker" had been responsible for the overbilling.

The reason that the Court saw no need to apply a policymaking requirement in the cases just discussed is evident. If a student is improperly denied the right to attend a public school for a period of time (*e.g.*, *Tinker*), it would make no sense to require the student to prove, as a precondition to obtaining an order requiring the school district to reinstate him, that the person who suspended or expelled him was a policymaker.[9] Similarly, if a public housing authority receives excessive rent payments from a tenant in violation of the Brooke Amendment, it cannot be that the tenant's right to compel the authority to disgorge the excess payments rests on whether a policymaker was responsible for exacting the overpayment. And, by the same token, if property is taken by a governmental officer for the use of the government and just compensation is not paid, it cannot be

---

deprivation so accomplished would be actionable under § 1983 if the state failed to provide due process for its agent's action. (The Court has subsequently overruled *Parratt* to the extent that the case held that a merely negligent loss of property may constitute a "deprivation." *Daniels v. Williams*, 474 U.S. 327 (1986). This casts no doubt on *Hudson*, which involved intentional destruction of property; nor does it affect the portions of *Parratt* discussed above.)

[9] The same would hold true insofar as damages are concerned, because there is "nothing . . . to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them." *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973).

that the right to sue the government for such compensation [10] rests on whether the taking was the act of a policymaker.

There is no occasion here to enumerate or to define with precision the various categories of cases in which an injury can be determined to be an act of the government without regard to the policymaking status of the individuals who recommended or decided upon the action that inflicted the injury.[11] For the reasons discussed, this plainly is such a case, and the requirement of § 1983 that the defendant must have "subjected or caused to be subjected" the plaintiff to injury has been satisfied.

III. But the fact that a claim may be maintained under § 1983 does not answer the question whether the government has violated the constitutional or statutory rights on which the plaintiff's claim is based. Section 1983, after all, is a "procedural" provision, *see Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600,

---

[10] Suits for a taking without just compensation are brought under § 1983. *See, e.g., Williamson Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985).

[11] It may be observed that many of the cases under discussion, including employment cases, involve a relationship between the plaintiff and the government that is contractual in nature. In such a case, the concern animating *Monell, i.e.*, that a government should not be held liable on the basis of the tort doctrine of *respondeat superior* for the "constitutional torts" of its employees, may be beside the point. The more appropriate common law analogy may be to contract law. If a party to a contract with an entity (governmental or otherwise) is deprived of the performance of the entity's obligations under the contract due to some act of an agent of the entity, the entity is to be held liable, without any need for resort to a concept of *respondeat superior*. *See generally* Restatement (Second) of Contracts, § 235(2) (1979) ("when performance of a duty under a contract is due any non-performance is a breach.") It would not occur to anyone to suggest in such a case that the entity should be excused from liability because the breach of contract was "only" the act of an agent. Certain property relationships (*e.g.*, use of one's property by and for the state) may lend themselves to a similar analysis.

617 (1979), that "does not provide any rights at all," *id.* at 618, but only provides a remedy for violations of other federal statutes or the Constitution. *See also Oklahoma City v. Tuttle*, *supra*, 471 U.S. at 816 (opinion of Rehnquist, J.); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). Thus, while § 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right," *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986), "in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right . . . ," *id.* at 330.

A. The question whether the elements of a violation, including any requisite state of mind, have been made out as against a particular defendant therefore must be answered not by reference to § 1983, but by examination of the underlying statutory or constitutional provision invoked. And, where the defendant is a governmental entity that can act only through human agents, the question whether the elements of a violation have been made out against *the entity* by virtue of the actions of particular individuals must be answered by reference to the same statutory or constitutional source.

There is no reason to think that any single concept—and certainly not the notion of "policymaking" as defined in *Praprotnik*—will provide a unitary rule for determining when it is appropriate to impute various actions or states of mind of particular individuals to a governmental entity for purposes of assigning liability under the many different statutory and constitutional provisions that are enforceable through § 1983. In some cases, for example, the rights at issue may not turn on questions of motivation or purpose at all, and a kind of strict liability may be involved.[12] In other cases more complex

[12] That would certainly appear to be true of regulatory statutes such as the Brooke Amendment, discussed *supra* at 14. It would also appear to be true of procedural due process requirements. *See supra* note 8.

elements will need to be proved, including a particular state of mind. In some such cases there may be reason to hold an entity responsible for the conduct or motives of particular persons even though such conduct or motives would not be attributable to the entity under common law agency principles.[13] In other cases, common law principles may provide a proper rule. And in others, some different approach altogether may be dictated by the particular statutory or constitutional provision involved.

In the present case, Jett's [redacted] race discrimination claim is based on the Equal Protection Clause, which requires a showing of discriminatory purpose, *see Washington v. Davis*, 426 U.S. 229 (1976), and on § 1981, which requires the same kind of showing, *see General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982) ("§ 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination"). The question thus becomes one of determining the circumstances in which the discriminatory motivation of an agent may render an entity liable under those two provisions.

B. In *General Building Contractors*, *supra*, the Court assumed, without deciding, that the motive of any agent, or at least any "servant," may be imputed to an employer under § 1981, in accordance with common law principles of *respondeat superior*. *Id.* at 392, 395. Justice O'Connor, joined by Justice Blackmun, suggested even more strongly that the plaintiffs could seek to establish "the employers' liability under § 1981 by attempting to prove the traditional elements of *respondeat superior*." *Id.* at 404 (concurring opinion). Because *respondeat su-*

---

[13] *Cf. Machinists v. Labor Board*, 311 U.S. 72, 80 (1940) ("The employer . . . may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*").

perior was well-established in the common law when the Fourteenth Amendment and § 1981 were adopted, *see Oklahoma City v. Tuttle*, *supra*, 471 U.S. at 835-38 (Stevens, J., dissenting), and because the considerations that led the Court to reject *respondeat* in construing § 1983 are not applicable here, *see supra* at 7-15, there is much force to the argument that *respondeat* should apply with full force in determining when the discriminatory motivation of a human agent is to be attributed to a governmental entity for purposes of both the Equal Protection Clause and § 1981.

C. To resolve this case, however, it is not necessary to embrace that broad proposition; for it is enough to recognize that if the decisionmaking process of a governmental entity has been so structured as to rely on the discretion of a particular agent to determine the course the entity will take, the motivation that animates the agent in exercising his discretion must be regarded as *the entity*'s motivation for purposes of § 1981 and the Equal Protection Clause. This rule reflects the fact that the motivation of an entity can *only* be the motivation of some human agent; and it is based on the sensible proposition that the entity must accept responsibility when it has created a situation in which the motivation of a particular individual is allowed to control the entity's actions. In such a case, the core command of both § 1981 and the Equal Protection Clause that the government not make decisions based on intentional discrimination requires holding that the governmental entity is liable.

1. This would comport with the approach generally followed by the courts in Title VII cases where questions of discriminatory intent, quite like those presented under § 1981 and the Equal Protection Clause, are raised. It certainly is not the law under Title VII that an employer is responsible only for the discriminatorily motivated acts of "final policymakers." Rather, as a general rule un-

der Title VII, an employer is liable for the discriminatory conduct of any *supervisor* acting within the scope of his employment (*i.e.*, any supervisor who is exercising the discretion conferred upon him to take actions affecting the employment of those he supervises). *See, e.g., Hamilton v. Rodgers*, 791 F.2d 439, 444 (5th Cir. 1986) (employer held liable under Title VII even though the court did not regard the "policy" requirement of § 1983 as having been satisfied); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972) ('where a discharge by a person in authority at a lower level of management is racially motivated, Title VII provides the aggrieved employee with a remedy [against the employer]"); *Mitchell v. Keith*, 752 F.2d 385, 389 (9th Cir.), *cert. denied*, 472 U.S. 1028 (1985); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Calcote v. Texas Educational Foundation*, 578 F.2d 95, 98 (5th Cir. 1978); *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 660 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984).[14] The employer is not, however, generally liable under Title VII for the discriminatory conduct of an "ordinary employee,"[15] even though it could

---

[14] This general rule has been applied in all areas of Title VII law, including cases of racial or sexual harassment. *See, e.g.*, 29 C.F.R. § 1604.11(c) (sexual harassment); *DeGrace v. Rumsfeld*, 614 F.2d 796, 803 (1st Cir. 1980) (race); *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982) (sex); *Hall v. Gus Const. Co., Inc.*, 842 F.2d 1010, 1016 (8th Cir. 1988) (sex); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979) (sex). However, in some harassment cases the employer is held not to be liable because the supervisor is found to have acted "outside the actual or apparent scope of the authority he possesses as supervisor." *Henson, supra*, 682 F.2d at 910. Thus this Court has noted that employers are not "always automatically liable for sexual harassment by their supervisors." *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

[15] *Henson v. City of Dundee, supra* note 14, 682 F.2d at 910. *See also Hall v. Gus Const. Co., supra* note 14, 842 F.2d at 1015; *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986); *Fain v. District of Columbia*, 568 F. Supp. 799, 804 (D.D.C. 1983). Of

be argued that a strict application of *respondeat superior* would call for liability in such a case as well.

Also instructive in this connection is the prevailing rule with respect to liability of an entity for punitive damages. Although there have been a multitude of approaches, both in 1871 and today, to the question of awarding punitive damages against an entity for the acts of an agent, *see American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982), the majority view, adopted in both the Restatement (Second) of Torts and the Restatement (Second) of Agency, is that a principal is not liable for punitive damages on the basis of the acts of *every* agent, but *is* liable for such damages on the basis of the acts of an "agent . . . employed in a managerial capacity." Restatement (Second) of Torts, § 909(c) (1979); Restatement (Second) of Agency, § 217C(c) (1958).[16] This rule is intended to impose liability on a corporation or other employer for the actions of agents who hold "important positions," *see* Restatement (Second) of Torts, *supra*, § 909, Comment b; and the concept of "managerial agent" has therefore been applied broadly to encompass persons who clearly would not satisfy the "final policymaker" test of *Praprotnik*. *See, e.g., Protectus Alpha Nav. v. Pacific Grain*, 767 F.2d 1379, 1387 (9th Cir.

---

course, an employer may be held responsible under Title VII for the discriminatory conduct of a nonsupervisory employee, or even in some cases a non-employee, if the employer ratifies or condones the conduct. *See, e.g.*, 29 C.F.R. § 1604.11(d), (e); *DeGrace v. Rumsfeld*, *supra* note 14, 614 F.2d at 803; *Hall*, *supra*; *Hunter*, *supra*. *Cf. infra* notes 16 & 19.

[16] The principal may also be assessed punitive damages arising out of the act of a *non*-managerial agent if the principal or a managerial agent authorized, ratified or approved the act, or if the principal was reckless in employing the agent. *See* subsections (a), (b) and (d) of the foregoing Restatement sections. *Cf. supra* note 15; *infra* note 19.

1985) (dock foreman was a managerial agent because he "performed a supervisory role, managing several employees," and "exercised a considerable amount of authority and discretion"); *Hatrock v. Jones*, 750 F.2d 767 (9th Cir. 1984) (*de facto* manager of a branch office of a brokerage firm was a managerial agent even though he was only a limited partner, was not licensed as a branch manager, and managed only one of the firm's 530 field offices); *Smith v. Little, Brown & Company*, 273 F.Supp. 870, 873 (S.D.N.Y. 1967), *aff'd.*, 396 F.2d 150 (2d Cir. 1968) (head of one department of a publishing house was a managerial agent because she was "a supervisory employee," *id.* at 873, even though she was not an officer of the company, *id.* at 871, and was not part of "management" as such, *id.* at 873. *Cf. NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (all faculty members at a university were "managerial" for purposes of the National Labor Relations Act). In determining whether an agent is managerial, the courts have focused particularly on whether the agent is allowed to exercise *discretion*. *See* J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* (1987), § 24.05 at 15 ("The key . . . in determining whether an agent acts in a managerial capacity is to look at what the individual is authorized to do by the principal and to whether that agent has discretion as to both what is done and how it is done"); *Protectus Alpha Nav. v. Pacific Grain*, *supra*, 767 F.2d at 1387.

Punitive damages are not favored in the law, because a plaintiff can be fully compensated for his injuries without receiving such damages.[17] Yet, as the foregoing discussion shows, even where punitive damages are concerned and *respondeat superior* therefore is not generally applicable, it has been recognized that an entity should

---

[17] Indeed, punitive damages generally are not available at all in suits against governmental entities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

be held liable for the wrongful conduct of those upon whose discretion the entity has chosen to rely.[18]

In sum, in a case such as this, where an act of the government is plainly involved and the requirements of § 1983 therefore are satisfied, a rule that holds the government responsible for the consequences of the discriminatory motivations of those upon whose discretionary judgments the government relies would best serve the purposes of the Equal Protection Clause and § 1981, and would comport with principles applied in analogous areas of the law.

2. In contrast, the "final policymaker" concept of *Praprotnik* would provide a wholly inappropriate vehicle to resolve this question.

It must be recalled that the *Praprotnik* test rests, in the end, on two points: the fact that § 1983 uses the words "subject or cause to be subjected," and the fact that the 1871 Congress refused to make governmental entities liable for the acts of private citizens engaged in a riot. *See supra* at 7-8. Whatever may be said of the strength of those points as support for the proposition that a governmental entity should not be held liable under § 1983 for a "constitutional tort" merely because it happens to employ a tortfeasor (*see supra* at 7-8 & note 4), neither the words of § 1983 nor the rejection of the Sherman Amendment plausibly can be viewed as constituting a congressional determination that the Equal Protection Clause or § 1981 should leave governments free to effectuate employment decisions that are based on

---

[18] We do not suggest that there is a close analogy between liability of an entity for punitive damages at common law and liability of an entity for *compensatory* damages under § 1981 and the Equal Protection Clause. Because punitive damages are generally disfavored, one would expect that the standard for awarding compensatory damages against an entity under § 1981 and the Equal Protection Clause would be substantially less strict than the standard for awarding punitive damages at common law. Our point is that even in the latter context, there is no notion that an entity should be held responsible only for the acts of "final policymakers."

the racially discriminatory motivations of important government officers, merely because the particular officers involved do not have "final policymaking authority."

The purposes of both the Equal Protection Clause and § 1981 would be far better served by the approach we have advocated than by application of the *Praprotnik* concept of "final policymaking authority."

IV. Applying this approach, in the present case it is clear that the decisionmaking process of the Dallas Independent School District was structured such that the discretionary judgment of Principal Todd was given controlling force in determining whether the School District would remove Jett from his position. This reflects the fact that Todd, even if he was not a "final policymaker," plainly held a supervisory, indeed, a managerial, position. Accordingly, whether or not Superintendent Wright or others had reason to suspect Todd's motives,[19] those motives should be imputed to the School District, and the District Court's finding of School District liability should be reinstated.

---

[19] Jett alleged that Wright did have reason to be concerned that Todd's statements might be racially motivated. Under the approach outlined in this brief, there is no need to address in this case any of the numerous questions that may arise when the plaintiff's theory of liability in a § 1983 case turns on allegations that one officer failed to train, supervise or correct the actions of a subordinate officer. *Cf. supra* notes 15 and 16; *City of Canton v. Harris*, No. 86-1088 (pending).

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed and the case should be remanded with instructions that the judgment against the School District on Jett's race discrimination claims be reinstated.

Respectfully submitted,

MICHAEL H. GOTTESMAN
JEREMIAH A. COLLINS *
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record